Petition

81-1261

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TOMMY LEROY SMITH, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

PROPOSITION I

Did the Appellant Court err in holding the Petitioner did not have standing to challenge the seizure of his luggage from another person's car.

PROPOSITION II

Did the Appellant Court err in not allowing an evidentiary hearing on Appellant's Motion to Suppress in the Trial Court.

PROPOSITION III

Did the Appellant Court err in allowing evidence of collateral issues to be presented by the prosecution in the Trial Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (Pt.App. A, pp. 1a-2a, infra) was filed on September 23, 1981, and is reported at 661 F.2d 943. The opinion is reproduced at Pet.App.A., pp. 1a-2a infra. Petition for a rehearing was denied and reproduced herein Pet.App. B, p. 3a.

JURISDICTION

The decision of the Court of Appeals was issued on the 23rd day of September, 1981. A timely petition for rehearing was denied on the 7th day of December, 1981. Pet.App.B, p. 3a infra. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The 4th Amendment of the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The 5th Amendment of the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 41(e), Federal Rules of Criminal Procedure:

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

STATEMENT

This case presents legal questions that are important to the Criminal Justice System. It rests on a few relevant and easily summarized facts. The issue is when a defendant files a timely motion to suppress evidence which is the evidence in chief in the defendant's trial, should the Trial Court allow him to present evidence to show that he has standing to object to said search and seizure or rule summarily, after hearing evidence from the government agent, that the defendant has not a *standing to object*.

Should the Trial Court allow the prosecutor to comment on evidence which the Trial Court has held to be inadmissible when said comments are objected to by the Petitioner, and are highly prejudicial to said Petitioner/Defendant and commented on only for the purpose of inflaming the jurors' minds to said defendant.

STATEMENT OF FACTS

On the 9th day of April, 1980, at approximately 12:30 P.M., the Appellant, who was a passenger in an automobile with his wife and another couple (Mr. and Mrs. Jay Crozier) were stopped some thirty (30) miles east of Yuma, Arizona, on Interstate Highway 8, wherein the driver of the vehicle was arrested without a warrant and placed in custody. Upon effecting the arrest of the driver, Crozier, the passengers, along with Crozier and the vehicle, were transported to a rest area approximately one fourth (1/4) mile east of where the vehicle was originally stopped. It should be noted that all passengers at the original stop were given their Miranda rights. (TR 58)* At the rest area, Crozier remained in the custody of one Lt. Penny in a police vehicle. At this time, all three remaining passengers gave identification data. The Special Agents then proceeded to search the vehicle (without a search warrant) and seized two ladies' hand bags from the passenger area of the vehicle and

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* Reference to Trial Transcript

then proceeded to take twelve (12) pieces of luggage from the trunk of said vehicle. Appellant Smith declined permission or consent to search of said luggage. (TR 82-85) The Special Agents then allowed the three (3) remaining passengers to proceed on their journey. Mrs. Smith testified that she drove the Crozier's vehicle to Oklahoma City, Oklahoma, where she left said car. (TR 133-134)

Special Agent Murphy, with Agent Ehrart, who was in charge, then placed the luggage in his vehicle and proceeded to the Yuma City-County Narcotics Task Force Office where the luggage was stored. (TR 63) In the late afternoon or evening hours, a search warrant for the luggage was obtained and Agent Murphy testified of finding a package containing a white powdery substance and clothing belonging to Mr. and Mrs. Smith. He also testified that there was a *name tag on the luggage identifying same as the Smith's luggage*. (TR 69-71)

Agent Ehrhart testified he more or less corroborated Agent Murphy's previous testimony. Agent Marian Lowe testified that she was a forensic chemist with the Drug Enforcement Administration and that she tested the contents which were seized by Agent Murphy at the time of defendant Crozier's arrest. She stated that said substance produced methamphetamine hydrochloride. (TR 113) With this, the State rested.

Appellant produced his wife, Mary Smith, who testified that she had packed the suitcase which was seized (Exhibit 1) on the 9th day of April, 1980, around 8:00 A.M., some four and one half hours prior to the stopping of the vehicle. She further stated that she did not lock same and that it was accessible to numerous people who were in and out of the Appellant's room at the residence of Jay Crozier, where Mr. and Mrs. Smith were staying. (TR 123)

In its rebuttal case, the United States recalled Special Agent Murphy. He testified that he seized a ziplock bag containing

methamphetamine from Mary Smith's purse during execution of the search warrant for the luggage, bags and purses from the Ford LTD (the vehicle involved). (TR 150-152) Upon the government's moving the envelope and drugs into evidence, defendant objected. The Court denied introduction of the physical exhibit, which was taken from Mary Smith's purse. However, Agent Lowe was called and advised that she performed a chemical analysis on the ziplock bag and found the residue contained methamphetamine but she further stated that she *did not* run an analysis on the ziplock bag as there was insufficient residue therein. Both sides then rested.

Proposition I: Did The Appellant Court Err In Holding The Petitioner Did Not Have Standing To Challenge The Seizure Of His Luggage From Another Person's Car.

In the case at bar, following his indictment and arrest on April 21, 1980, petitioner filed his timely motion to suppress, on the 9th day of June, 1980 (C.T. 45). This motion alleged lack of probable cause to detain petitioner, lack of arrest warrant for the petitioner or his belongings, lack of probable cause in the search warrant to take petitioner's personal luggage from the automobile in which he was a passenger.

The Court, during the hearing on petitioner's motion to suppress, would not allow petitioner's attorney to present evidence through a witness, whose testimony would have concerned the circumstances surrounding the arrest and seizure of said evidence in chief. (TR 4-16). This is in complete violation of petitioner's rights provided him in the 5th Amendment of the United States Constitution.

As stated in *Moncusi* v. *DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 206 F.2d. 1154, if petitioner can establish facts showing such an interest, he will have demonstrated a basis for standing to attack the search.

Here, in the case at bar, the petitioner attempted to show standing but was denied the right to do so. All of the cases cited by respondent state that the defendant in said cases *failed to present evidence as to show* standing, such as ownership, and interest in said premise. See *Combs* v. *United States*, 92 S.Ct. 2284, p.2286, *United States* v. *Portillo*, 633 F.2d 1313, *Rakas* v. *Illinois*, 439 U.S. at 148, *United States* v. *Salvacci*, 65 L.Ed.2d at 630(6):

> "The respondents relied on automatic standing and did not attempt to establish that they had a legitimate expectation of privacy."

See also, *United States* v. *Santora*, 600 F.2d 1320:

> ". . . none of the appellants specifically sought an evidentiary hearing."

In *Robbins* v. *California*, 29 Cr.L. 3115, this Honorable Court made clear that there is an expectation of privacy manifested by putting something in a closed container, stating, as in *United States* v. *Chadwick*, 433 U.S. 1, 21 Cr.L. 3169 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753:

> "The contents of Chadwick's footlocker and Sanders' suitcase were immune from a warrantless search as they had been placed within a closed, opaque container and because Chadwick and Sanders had thereby reasonably 'manifested any expectation that the contents would remain free from public examination.' "

Not to be redundant, there was no doubt as to the ownership of petitioner's luggage because it was clearly marked as to ownership. This was testified to by Government Agent Murphy. (TR 69-71)

That to state, or for a Court to state, that a defendant does not have the right to put on evidence in support of his contention that the seizure of his personal luggage was in violation of his constitutional rights, as set forth in the 4th Amendment to the United States Constitution and Title 18, Rules 41(e), Rules of

Criminal Procedure, is another absurdity that the respondent has placed before this Court. See, *Alderman* v. *United States*, 394 U.S. 165, 22 L.Ed.2d 176, wherein it is stated in part:

> "The trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince this trial court that its proof had an independent origin."

See also, *Johnson* v. *United States*, 333 U.S. 10, 68 S.Ct., 367; *Jones* v. *United States*, 326 U.S. 257, 261, 4 L.Ed.2d at p. 702.

In *Combs* v. *United States*, supra, it is stated:

> "If Petitioner can establish facts showing such an interest he will have demonstrated a basis for standing to attack the search."

In the case at bar, the Petitioner attempted to establish facts but was denied by the Trial Court. See also, *Katz* v. *United States*, 389 U.S. 347, 19 L.Ed.2d 576.

Proposition II: Did The Appellant Court Err In Not Allowing An Evidentiary Hearing On Appellant's Motion To Suppress In The Trial Court.

The mere fact that Appellant was arrested in an automobile and once the arresting officers had stopped said automobile and have complete control over the automobile, indicate that it is a clear detention, especially when the said automobile is moved from one place of detention to another place of detention. The infringement upon Appellant's travel was not merely incidental to Appellant but was, in reality, an arrest and detention of said Appellant. See *Preston* v. *United States*, 376 U.S. 364; *Henry* v. *United States*, 361 U.S. 98. Said search of the vehicle could have been made after it was stopped and impounded, and said search could have been made with a search warrant, *Johnson* v. *United States*, supra. The search did not fall under the exigent circumstances as set forth in *Chambers* v. *Monroney*, 399 U.S.

42; *Carroll* v. *United States*, 267 U.S. 132. The arresting officers in the instant case did have complete control over said occupants of the vehicle. Occupants and vehicle were detained at that time.

However, most recently in *New York* v. *Belton*, 69 L.Ed.2d 768 (1981), the United States Supreme Court passed upon this exact issue as to the permissible scope of a search incident to a lawful arrest occuring in an automobile. The Court in New York v. Belton, supra, held that:

> "When a policeman has made a lawful custodial arrest of an occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. It follows from this conclusion that the police may also examine the contents of any *containers found within the passenger compartment*, for if the passenger compartment is within reach of the arrestee, so also will *containers in it be within his reach*." *United States* v. *Robinson*, 414 U.S. 218 (1973); *Draper* v. *United States*, 358 U.S. 307 (1959); *New York* v. *Belton*, 69 L.Ed.2d 768, 775.

As defined:

> " 'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses *only the interior of the passenger compartment* of an automobile and *does not encompass the trunk*."

New York v. *Belton*, Id. at p. 775.

The Government admits that the agents lacked probable cause to believe the drugs or drug related evidence would be found in the vehicle, as stated in the Government's answer brief at pg. 20, wherein it was stated:

> "A reading of the facts set forth in the search warrant affidavit demonstrates that up until the time Crozier was

> observed leaving his residence in the Ford LTD with defendant and other individuals, just after the execution of the search warrant at Home Ranch, Inc., and the resulting seizure of the clandestine laboratory there, *the agents lacked probable cause to believe that drugs and drug-related evidence would be found in this vehicle.*

It should be noted, as heretofore set forth, that the officers should have been limited in their search, when they arrested the defendant Crozier, to within the immediate vicinity of Crozier. The officers refused to limit their search. Crozier was placed in the police car and never alighted therefrom until he was placed in the custody of the Yuma jail. Therefore, the officers did not have a right to move the vehicle some one fourth of a mile away and search same without first obtaining a warrant. On a stop and search, it is heretofore set forth in *Terry* v. *Ohio*, supra, that the officers went beyond their arresting capacity to search, especially since they had complete custody and control over the vehicle and should have procured a warrant for the search of the trunk of said vehicle before attempting to seize any property located in the trunk of the vehicle. See *Chemil* v. *United States*, 395 U.S. 752.

As to the affidavit for the search warrant issued by the Magistrate, said affidavit was a supplement of an original affidavit which, in and of itself, was insufficient as a matter of law. The affidavit does not refer to petitioner's luggage, nor contain anything referring to this petitioner. It does not even make mention of the petitioner's name as being involved, associated with, or engaged in any business ventures with any of the other aforementioned parties, which were set forth in the affidavits. The affidavit, as to the Petitioner Smith, is based upon conjecture, suspicion and conclusions of law set out by Agent Murphy, who was the affiant in all affidavits issued involving the original defendants in the case at bar. See: *Aquilar* v. *Texas*, 378 U.S. 108; *Spinelli* v. *United States*, 393 U.S. 410.

Proposition III: Did The Appellant Court Err In Allowing Evidence Of Collateral Issues To Be Presented By The Prosecution In The Trial Court.

The collateral issues raised in the case at bar were proferred by the Prosecuting Attorney on her cross-examination of Appellant's wife, Mary Smith. All the Prosecuting Attorney's questions insinuated that the Appellant's wife, Mary Smith, who was with him when they were stopped by Agent Murphy, was a user of drugs and had drugs in her possession on the 9th day of April, 1980, when the vehicle was stopped by Special Agents and Arizona officers. This was highly prejudicial to the Appellant considering his relationship with the witness, Mary Smith. The tenacity with which the Prosecuting Attorney proferred the questions should be noted. She also mentioned evidence that she well knew was not properly introduced into evidence. Said mention was set forth in her closing argument.

Page 138 of trial transcript, in part, sets forth the following:

> "Q. Isn't it true, Mrs. Smith, that the white powder bag — strike that — that clear ziplock bag which contained some white powder residue later identified as methamphetamine, was in your purse on April 9, 1980, when it was removed from the Ford LTD?
>
> Mr. Robertson: Your Honor, that question has been asked and answered.
>
> Ms. Rosen: Your Honor, that question has never been asked and answered.
>
> Mr. Robertson: Sure, testified she never saw it before.
>
> The Court: Objection is overruled.
>
> Q. (By Ms. Rosen) Mrs. Smith, isn't it true that the small ziplock plastic envelope was in your purse containing methamphetamine at the time that this purse was taken on April 9, 1980, by the agents?
>
> A. Not to my knowledge.

It is also set forth at page 151 of the trial transcript:

Q. And you can tell the jury whether or not you took that ziplock bag contained in the evidence envelope as Government's Exhibit 13 from any other item that you have described?

A. Yes. This . . . the clear plastic bag and the evidence envelope came from the purse of Mary Helen Smith.

Q. And was that ziplock bag in the purse at the time you seized it on April 9, 1980?

A. Yes, it was.

Q. And would you tell us about the — strike that. After you seized that Exhibit 13, the small ziplock bag, what did you do with it?

A. The bag was placed in the evidence envelope and sealed, and on April 16, 1980, it was turned over to Evidence Technician Wahlquist.

Q. Along with the approximately two and a half pounds of methamphetamine that had been seized from Mr. Smith?

A. Yes.

Mr. Robertson: Object to that, Your Honor.

The Court: Overruled.

Ms. Rosen: I will withdraw it, Your Honor.

It is also set forth at page 152-153 of the trial transcript:

Ms. Rosen: Your Honor, I would offer Exhibits 12, 13 and 14, the black purse; the small ziplock bag inside the DEA evidence envelope; and the small ziplock bag that had been found in Exhibit 1.

Mr. Robertson: We have no objection to the introduction of the exhibit found in the brown bag, Your Honor. However, we do object to the introduction of the other two exhibits in that at the time they were seized Mrs. Smith evidently was not under arrest, there is no search warrant for obtaining this bag from Mrs. Smith. This bag was

seized without authority of law, and anything found therein is objectionable to be admitted in evidence.

The Court: Objection is sustained as to the purse and the other envelope. The small one that was in the bag may be received.

Ms. Rosen: Your Honor, might we have a side bar on that, or I would like an opportunity to respond.

The Court: No. There is no relevance. The man's wife had the bag. She isn't here charged with anything.

Ms. Rosen: She testified, Your Honor, that she knew nothing about the methamphetamine in the suitcase. She denied that she had any methamphetamine, and in fact, she did. That is what this evidence is designed to prove.

The Court: That, in fact, she did have knowledge about the methamphetamine, you have that before the jury, and that is for impeachment purposes. But there is no hard evidence as to that with respect to this.

Ms. Rosen: I have made my proffer, Your Honor."

It is also set forth at page 154-55 of the trial transcript:

"Q. I see, sir, You say there wasn't enough there to measure?

A. There was not enough to do a quantitative analysis.

The Court: In other words, there was not enough material?

The Witness: Yes.

Mr. Robertson: No further questions."

It should be noted that the Court sustained the objection of Appellant's counsel as to introduction of any evidence taken from the purse of Appellant's wife, Mary Smith. (TR 152) (Exhibit 13)

Thereafter, the Prosecuting Attorney again attempted to introduce said evidence by innuendo. She again refers to the said Exhibit 13, which had previously been ruled inadmissible by

the Court as it was not proven whether or not it contained methamphetamine. In her final arguments, the Prosecuting Attorney again referred to the articles taken from Mrs. Smith's purse, over the objection of Appellant's counsel. The Prosecutor did not even give the Court the time to rule on Appellant's objection. Rather, she continued to submit to the jury, by inference and innuendo, that Mrs. Smith used amphetamines and lied about the same in her testimony from the stand. (TR 160-161) This was put into the record by the Prosecuting Attorney for one reason only, to inflame the minds of the jurors and to discredit the witness. The Prosecutor did this although she knew the evidence was not admissible and that there should have been no reference to the same. She knew that the Court had ruled said evidence was inadmissible. However, the Prosecutor did get it before the jury. Even had the jurors been admonished to disregard same, it would have been impossible to erase same from the minds of the jurors. It is Apppellant's contention that the overzealous efforts of the Prosecuting Attorney has been shown.

As stated in *Berger* v. *United States*, 55 S.Ct. 629, 295 U.S. 78, 79 L.Ed. 1314:

> "In the trial of a criminal case, a high and important duty and responsibility are imposed on the prosecuting attorney, it is his duty to see that the Government's case is properly presented with earnest and vigor, and to use every legitimate means to bring about a just conviction but he has the duty to refrain from improper methods calculated to produce a wrongful condition and while he may strike hard blows he may not strike foul ones."

See *Pittman* v. *United States*, 42 F.2d 793; *Sanders* v. *United States*, 206 F.2d 86; *Fishwich* v. *United States*, 67 S.Ct. 224, 329 U.S. 211, 91 L.Ed. 196; *Blackwell* v. *United States*, 244 F.2d 423; *Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1559; *United States* v. *Dresser*, 112 F.2d 972; *United States* v. *Bourjaily*, 167 Federal Reporter, 2nd Series, 993.

The question in the case at bar is, what effect did the errors herein above described have or what effect may they reasonably have had upon the jury's decision. We submit that they had a prejudicial effect on the jury in reaching their decision in the case at bar.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that this Court grant this Petition for Writ of Certorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 80-1826
D.C. No. Cr-80-082WEC

UNITED STATES OF AMERICA,

Appellee,

v.

TOMMY LEROY SMITH,

Appellant.

MEMORANDUM

Appeal From The United States District Court
For The District Of Arizona

Walter E. Craig, District Judge, Presiding
Submitted July 13, 1981

Before: ELY and CHOY, Circuit Judges, and
PFAELZER,* District Judge

Appellant Smith does not have standing to challenge the legality of the April 9, 1980 seizure and search of Clarence Crozier's car, in which Smith and his wife were passengers. *See United States* v. *Calvucci*, 448 U.S. 83, 95 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 133-49 (1978); *United States* v. *Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980). The warrantless seizure of all the luggage in Crozier's car, pursuant to a valid custodial arrest, did not violate Smith's Fourth Amendment rights. *See United States* v. *Chadwick*, 433 U.S. 1,

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*The Honorable Mariana R. Pfaelzer, United States District Judge, Central District of California, sitting by designation.

13-14 n.8, 15 (1977); *United States* v. *Robinson*, 414 U.S. 218, 224-26, 234-36 (1973); *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970).

The affidavit supporting the magistrate's issuance of a search warrant for Smith's luggage set forth facts and circumstances sufficient to "warrant a man of reasonable caution in the belief that the items to be seized (*i.e.*, drug contraband) were in the stated place (*i.e.*, the luggage found in Crozier's trunk)." *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970). *See Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964); *United States* v. *Dubrofsky*, 581 F.2d 208, 212-13 (1978); *United States* v. *Spearman*, 532 F.2d 132, 133 (9th Cir. 1976).

The District Court's denial of Smith's request for an evidentiary hearing on his suppression motion was not an abuse of discretion. *See United States* v. *Santora*, 600 F.2d 1317, 1320 (9th Cir. 1979), *United States* v. *Ledesma*, 499 F.2d 36, 39 (9th Cir.), *cert. denied*, 419 U.S. 1024 (1974). Nor was the District Court's denial of Smith's motion for a continuance an abuse of discretion. *See United States* v. *Hoyos*, 573 F.2d 1111, 1114, (9th Cir. 1978).

Finally, the Government's introduction of evidence concerning methamphetamine powder found in Smith's wife's purse was not erroneous because the presence of the drugs in Mrs. Smith's purse was probative of "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). Specifically, such evidence tended to refute Mrs. Smith's testimony that she had packed the Smiths' luggage and had not placed any methamphetamine powder in the suitcase.

Smith's claims on appeal are without merit and his conviction is therefore

AFFIRMED.

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 80-1826
D.C. No. CR 80-082WEC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TOMMY LEROY SMITH,
Defendant-Appellant.

ORDER

Before: ELY and CHOY, Circuit Judges, and PFAELZER,* District Judge

The Petition for Rehearing is denied.

Filed
Dec 7 1981
CLERK, U.S. COURT OF APPEALS